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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 250

IN THE MATTER OF SHERIDAN VIEW BUILDING CORPORATION, DEBTOR

CORNELIUS J. COLLINS, ET AL., PETITIONERS

v.

LESTER L. SEIFRIED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, IN SUPPORT OF THE PETITION

The Securities and Exchange Commission did not participate in the District Court proceedings in the present case but, with leave of court, appeared as *amicus curiae* in the appeal before the Circuit Court of Appeals for the Seventh Circuit. It submits this memorandum as *amicus curiae* in support of the instant petition for a writ of certiorari filed by minority bondholders of the debtor.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 116–119) is reported at 149 F. 2d 532. The District Court filed no opinion but entered a written order approving the petition for reorganization as having been filed in good faith (R. 16–21).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 6, 1945 (R. 120). The petition for a writ of certiorari was filed on July 21, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347 (a).

QUESTION PRESENTED

Whether a Chapter X reorganization proceeding must be dismissed in favor of a recently instituted prior proceeding affecting the Debtor because it appears that a single class of creditors is entitled to a preponderant interest in the Debtor's assets, despite a clash of interests within the class and indications that the situation presented is fraught with the possibility of inequitable conduct operating to the detriment of unorganized security holders.

STATUTES INVOLVED

The following sections of Chapter X of the Bankruptcy Act provide:

Section 130, 11 U. S. C. 530:

> Every petition shall state * * * (5) the nature of all pending proceedings affecting the property of the corporation known to the petitioner or petitioners and the courts in which they are pending; * * * (7) the specific facts showing the need for relief under this chapter and why adequate relief cannot be obtained under chapter XI of this Act; * * *

Section 144, 11 U. S. C. 544:

> If an answer filed by any creditor, indenture trustee, or stockholder shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied.

Section 146, 11 U. S. C. 546:

> Without limiting the generality of the meaning of the term "good faith" a petition shall be deemed not to be filed in good faith if * * * (4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding.

Section 256, 11 U. S. C. 656:

> A petition may be filed under this chapter notwithstanding the pendency of a prior mortgage foreclosure, equity, or other proceeding in a court of the United States or of any State in which a receiver or trustee of all or any part of the property of a debtor has been appointed or for whose appointment an application has been made.

STATEMENT

The litigants hold interests in the Debtor's principal bond issue—an issue of second mortgage bonds of which $200,800 were outstanding on December 1, 1944, the date of maturity. This issue is now in default. A first mortgage debt of $26,000 is also outstanding, but is not in default. The sole asset of the debtor is an apartment building in Chicago, Illinois. The bondholders are also the owners of all of the Debtor's capital stock as a result of a prior local reorganization under which stock holdings were attached to bond ownership, and pursuant to which a proportionate interest in the stock passes with a transfer of bonds. (R. 3, 10, 11, 26.)

The bonds presently in default were issued pursuant to a trust indenture naming The Trust Company of Chicago as trustee and empowering holders of 51% of the outstanding bonds to direct and control the acts of the trustee and to remove the latter at their pleasure (R. 25, 86).

Under the indenture the Debtor waived all rights of redemption in the event of a foreclosure sale (R. 30).

In his statement under Section 210 of the Bankruptcy Act (11 U. S. C. 610), respondent Seifried, who opposed the Chapter X petition for reorganization, listed himself as the owner of $132,800 of the second mortgage bonds which he had acquired between October 9, 1944, and December 19, 1944, and which is 66.1% of the outstanding issue (R. 13–14). It appears, however, that one Howard F. Bishop, a Chicago attorney, actually furnished the money with which Seifried purchased these bonds and apparently is the real owner of these securities (R. 23–26, 32, 47). The average purchase price was $68 as against a par value of $100 (R. 32).

On December 2, 1944, the day following maturity and default on the bonds, Bishop having then acquired more than 51% of the outstanding bonds and also having a controlling interest in the stock, called upon an officer of the corporate indenture trustee with a prepared bill of foreclosure and, purporting to act as Seifried's attorney only, requested and obtained the proper execution of the bill and arranged for the employment of his own law firm as attorney for the indenture trustee in the foreclosure proceeding (R. 27–29, 35–38). Immediately thereafter, the bill of foreclosure was filed in the Superior

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Court of Cook County, Illinois, to which the only parties were the indenture trustee, as plaintiff, and the Debtor, as defendant. No notice was given any of the other bondholders and apparently none was required under state law since, under the indenture, these bondholders were not necessary parties to the foreclosure proceeding.

Several days later, on December 9, 1944, petitioners, minority holders of $5,700 of the second mortgage bonds, filed a creditors' petition under Chapter X, noting *inter alia* the pendency of the local bill of foreclosure but alleging with respect to the foreclosure proceeding that increased real estate taxes, increased operating and labor costs, and O. P. A. rent ceilings made it improbable that a fair price for the Debtor's apartment building could be obtained at the foreclosure sale and that the sale would result in great loss to bondholders and to the Debtor. Relief accordingly was sought in a Chapter X reorganization modifying and altering the rights of the secured creditors. (R. 2–8.) Thereupon Seifried filed an answer attacking the "good faith" of the petition, challenging the possibility of reorganization, and alleging that the bondholders were adequately protected by the state court proceedings (R. 9–12). At the hearing on the "good faith" issue, it appeared that Seifried and Bishop had not resorted to the state court foreclosure pursuant to any program for reorganization or otherwise in furtherance of the interests of the bondholders

as a whole (R. 31, 37), but were relying on their rights under the indenture as majority holders to direct the action of the trustee. Under the indenture, they would be in a position to apply their bonds in payment of the purchase price and secure title free from any possibility of redemption by the Debtor (R. 43, 73). No opposition to the foreclosure was offered by the debtor. Seifried and his "attorney," Bishop, had been associates in a number of real estate ventures (R. 46 *et seq.*) and it is not an unwarranted inference that they desired to use their recently acquired bonds either to acquire the property for themselves as cheaply as possible or to effect a sale to a third party under some prior arrangement, and that their self-interest conflicted with that of other bondholders.

At the hearing respondent offered in evidence an appraisal by the Chicago Real Estate Board, dated December 22, 1944, estimating the fair market value of the Debtor's property at $171,000, which is $55,800 less than the first- and second-mortgage indebtedness (R. 47, 74–84). Petitioners objected to its relevancy and were sustained by the court.

The District Judge entered an order on January 5, 1945, approving the petition as having been filed in "good faith," and appointing a trustee for the Debtor and its property (R. 16–21). Thereupon Seifried appealed to the Circuit Court of Appeals for the Seventh Circuit. On June 6,

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1945, that court reversed the order of the District Judge on the ground that petitioners had not established the inadequacy of the state foreclosure proceedings for the protection of their interests and that no "need for relief" existed under Chapter X, noting from the excluded appraisal report the probable lack of any equity in the property beyond the interests of the mortgage bondholders. The present petition for a writ of certiorari followed.

ARGUMENT

I

The issue presented is of substantial importance. Under the construction of Section 146 (4) of the Bankruptcy Act, 11 U. S. C. 546 (4), adopted by the Circuit Court of Appeals in the instant case, the right to reorganization under Chapter X has been made to depend on the outcome of a race of diligence in cases involving corporations with simple debt structures in which a senior class of creditors is alone possessed of any equity in the principal assets of the debtor.

Corporate reorganizations of this type are common, particularly in the real estate field, where a need often exists to accord the benefits of Chapter X procedures to widely scattered public investors.[1] The instant holding, in effect, *pro tanto*

[1] In the late 'twenties certificates of fractional interest in real estate mortgages upon apartment houses, office

repeals the provision of the Bankruptcy Act which expressly states that a petition may be filed under Chapter X notwithstanding the pendency of a prior proceeding (Section 256, 11 U. S. C. 656), although Section 146 (4) provides for the dismissal of a Chapter X petition on account of a prior pending proceeding only where the interests of creditors and stockholders would be "best subserved" in the prior proceeding.

The Circuit Court of Appeals for the Third Circuit has also adopted this view of Section 146 (4) in its recent decision in *In re St. Charles Hotel Company,* 149 F. 2d 645, affirming on opinion of the District Court, 60 F. Supp. 322 (D. N. J.) petition for certiorari filed July 27, 1945. The Commission is filing a companion brief supporting the

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buildings and hotels were widely distributed among a class of investors who did not foresee the difficulties of enforcing their claims in the event of default. The plight of such investors was one of the major scandals in the reorganization field and became the subject of investigation by Federal and state legislative committees and by the Securities and Exchange Commission. See *Hearings before the Select Committee on Investigation of Real Estate Bondholders' Reorganizations, House of Representatives* (1934–1936); *Hearings before the Joint Legislative Committee to Investigate Legal Investments for Savings Banks, et al.* (N. Y. 1933); *Report of the Joint Legislative Committee to Investigate Bondholders' Committees, et al.* (N. Y. 1936); *S. E. C. Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part III, Committees for the Holders of Real Estate Bonds* (1936).

While that portion of the Commission's Report which dealt with committees for the holders of real estate bonds

petition for certiorari in that case,[2] to which the Court is respectfully referred.

The effect of these circuit court decisions has been to deny invocation of the paramount Federal bankruptcy power in favor of the prior state court proceedings, despite their inadequacy judged

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concerned itself primarily with misuse of the reorganization process by the house of issue, it was incidentally revealed that in the real estate field investors' holdings were "unusually small and the holders exceptionally dispersed" (S. E. C. *Report*, *supra*, Pt. 3, p. 29), making the holders unusually helpless in the face of the superior facilities for organization of those affiliated with the house of issue. We believe that comparable opportunities for prejudice to the scattered holders of real estate bonds may exist even where the house of issue does not happen to be the focal point of reorganization maneuvers. Congress took specific cognizance of the need for the exercise of the bankruptcy powers in this field of reorganization—e. g., Chapter XII, designed to reach situations, particularly in the Chicago Metropolitan area, where the debtor happened to be an individual rather than a corporation (See H. Rep. 1409, 75th Cong. 1st sess., p. 51); Sections 256 and 131 (4) of Chapter X, broadening the scope of the corporate reorganization provisions to reach cases in which a petition might be predicated on a mortgage foreclosure receivership to which this Court had held Section 77B inapplicable in *Duparquet, Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216; and Section 126, broadening the class of persons entitled to file an involuntary petition to include holders of claims against the property of a debtor as well as persons holding claims against the debtor. This was stated to be relevant chiefly to the real estate situation where debtors may purchase property subject to, but without assuming liability on, a mortgage. S. Rep. 1916, 75th Cong., 3d sess., p. 21. See *Brooklyn Trust Company* v. *R. A. Security Holdings, Inc.*, 134 F. 2d 164 (C. C. A. 2).

[2] *Ladin* v. *Hurwith*, No. 264, this Term.

by Chapter X standards and the existence of circumstances which point strongly to a need for the protections and advantages afforded by Chapter X machinery. The circuit courts have made unjustified assumptions as to the adequacy of the older foreclosure and receivership procedures which Chapter X was intended to supplant, and have imposed upon the petitioner the impossible burden of establishing in each case that harmful or inequitable consequences would necessarily result in the prior proceeding, instead of permitting reliance upon facts which are relevant to the legislative determination as to when Chapter X proceedings may be invoked. No effort has been made in these cases to determine whether, in light of the existing conflict among creditors as revealed by the race to institute the proceedings and other circumstances indicating the potentiality of abuse, the prior proceeding would actually "best subserve" the interests of creditors and others affected. On the contrary, the courts have been content with determining that junior interests have no equity in the sole or principal assets of the debtor and have held such cases to be proper ones for the relinquishment of Federal jurisdiction under the purported authority of the decision of this Court in *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.*, 317 U. S. 78.

As we show below (pp. 15–16), the burden which the *Marine Harbor* case holds to be on the petitioner is one which this Court recognized might

be met by showing the kind of clash of interests and opportunity for abuse which makes relevant the superior safeguards of Chapter X. The Circuit Courts of Appeals for the Third and Seventh Circuits, however, have appeared to treat as a rule of thumb the particular illustration of a conflict of interests justifying resort to Chapter X proceedings, which was adverted to by this Court. The Court's reference to "the usual reorganization proceeding dealing with more than one class of securities under the older procedures which Ch. X was designed to improve and supplant" (317 U. S. at 87) is thus regarded by the two Circuits as an all-inclusive determination that prior proceedings are to take precedence where only one class of securities is predominantly affected. We believe that the result is the application as a governing principle of a statement which this court intended merely as an illustration of the type of cases in which a clash of interests is normally found. The consequence is virtually to preclude the availability of Chapter X where only a single class of creditors is substantially interested, even though the priority of the competing proceeding is a matter of days and results from a race of diligence which only emphasizes the clash of interests within the single class of creditors affected. As a consequence of these circuit court holdings there is a real need for further definition and clarification by this Court of the term "good faith" as it appears in Section

146 (4) of the Bankruptcy Act. Otherwise, the benefits of Chapter X will in practice be rendered unavailable to a substantial class of creditors and corporate debtors, contrary to the true intendment of the statute.

The *Marine Harbor* case upon which the circuit courts have relied is not authority for the rulings made. That case did hold that Section 146 (4) must be read together with Section 130 (7) as imposing upon the petitioner the necessity to "demonstrate that at least in some substantial particular the prior proceedings withhold or deny creditors or stockholders benefits, advantages, or protection which Ch. X affords" (317 U. S. at 84). Thereby this Court rejected a narrower construction of the statute under which, if the appropriateness of a Chapter X petition is in other respects established, it may supplant the prior proceeding only if it is demonstrated that the interest of security holders will not be best subserved in the prior proceeding.[3] In that case the senior credi-

[3] The majority of the Circuit Court of Appeals had assumed without discussion that the Chapter X procedure would best subserve the interest of creditors, but found that in other respects the good faith standard was not met. Frank, J., dissenting, had intimated that the burden on those seeking to dismiss the Chapter X proceeding required a demonstration that the state court procedure would result in the parties being protected by safeguards substantially equivalent to those of Chapter X and that this might require that the state court proceeding had progressed to the point where a plan had been proposed, which on examination by the federal court appeared "fair and equitable" and "feasible." See 125 F. 2d 296, at p. 303.

tors (who alone had an equity) were holders of certificates of participation in a first mortgage. They were represented in the state court action (which had been of substantial duration) by an independent trustee under the New York Schackno Act who was empowered to take title to the mortgaged property on behalf of the entire class of security holders affected. There was no conflict among these security holders as to the preferability of the state proceedings and it appeared that the presumptive result of those proceedings would be, by foreclosure, "an appropriation of the assets of the debtor for the benefit of the certificate holders exclusively" (317 U. S. at 87). Irrespective of the general superiority of Chapter X machinery as a vehicle for reorganization, therefore, this Court held the petitioner had not met the burden upon him because, among other reasons, there was in this instance "no showing that the machinery employed or available in the state foreclosure proceeding to safeguard and protect the interests of those creditors *after* the sale is not comparable to that contained in Ch. X for the consummation of plans which are not only fair but feasible." It was in this context that the Court concluded:

> In view of the burden on a petitioner to make the showing required by § 130 (7) and § 146 (4), the bankruptcy court is not warranted in assuming, without more, that a state foreclosure proceeding instituted

> for and on behalf of the first mortgage creditors exclusively, is inadequate, measured by Ch. X standards, to protect their interests. The contrary course would result in Ch. X making greater inroads on prior proceedings than § 130 (7) and § 146 (4) indicate was the purpose. [317 U. S. at 88.]

In rejecting a construction which might leave very little room for the continuation of prior proceedings, the Court nevertheless recognized that a normal and expressly sanctioned purpose of the filing of petitions under Chapter X was the displacement of prior proceedings as is indicated by Section 256.[4] The Court also indicated that the Chapter X petitioner may meet the burden imposed upon him if he can show the existence of a clash of interests which the Chapter X safeguards are peculiarly adapted to resolve—e. g., to protect scattered investors against the power

[4] The Court's reference to Section 256 occurs in that portion of the opinion wherein it rejected a holding of a majority of the court below that prior participation in the state court proceedings would impose a personal disqualification on the petitioner irrespective of the interests of creditors and stockholders. The Court stated that this "would effect a substantial impairment of § 146 (4), since it would be the exception rather than the rule where both the debtor and the creditors had not taken some part in the prior proceedings" (317 U. S. at 85). We believe the same consideration equally applicable to any argument which would make the existence of the prior proceeding an automatic bar to a filing in good faith of a petition under Chapter X.

of those in a dominant strategic position with reference to the foreclosure or judicial sale, which was the critical point "under the older procedures which Ch. X was designed to improve and supplant." The illustration which this Court gave was a reorganization proceeding which deals with more than one class of securities where "the safeguards afforded by Ch. X would have special significance in protecting the respective classes of investors against improvident, unfair or inequitable adjustments, compromises, and settlements—steps which are basic to the reorganization process but which in selfish hands led to much abuse." (317 U. S. at 87.) We believe, however, that this was not intended as an all-inclusive statement of situations in which Chapter X might displace the prior proceeding.

The instant case and the *St. Charles* case (*supra*, p. 9) deal with situations in which only a single class appears to have a substantial interest in the proceeding.[8] Nevertheless, in each case the clash of interests among the members of that class presents opportunities for questionable maneuvers in connection with a judicial sale, not less harmful than those in the case of a reorganization which affects a number of classes. In each case the proceeding appears to be moving toward a sale in which the interest of the dom-

[8] The existence of substantial free assets presents an additional problem in the *St. Charles* case.

inant group may prevail over that of the scattered minority bondholders.[6] While the equitable jurisdiction of the state courts may afford safeguards against gross abuse in foreclosure suits, their powers are no greater than those in an equity receivership proceeding, the traditional inadequacies of which led to the bankruptcy reorganization statutes. H. Rep. No. 1409, 75th Cong., 1st Sess., p. 37 *et seq.*; *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 448–450. This legislative background of Chapter X was completely overlooked by the court below, in its assumptions as to the adequacy of the state court procedure.

The *Marine Harbor* decision, dealing as it did with state court proceedings of substantial previous duration, did not consider situations in which the priority in point of time in the earlier proceedings is slight, resulting simply from a race of diligence. In such a case, the petitioner should be able to meet his burden of establishing good faith by showing that the type of reorganization problem presented is one which makes relevant

[6] The probability that the successful purchaser at the sale will be a person or group in a position to fullfill his bid in large part by tendering bonds affords the potentiality of abuse towards which Chapter X safeguards were directed. Although that evil was most frequently manifested in instances where the dominant group combined with equity interests in an unfair plan, it would, we believe, be an unduly narrow construction to limit the availability of Chapter X to instances where such combination, actual or potential, is established.

the superior safeguards of Chapter X. And, if priority in point of time is not to be the sole test, it would be undesirable to require that the prior proceedings shall continue to the point where the inadequacies which induced Congress to provide for reorganization under the Bankuptcy Act have been specifically demonstrated (such as an unfair plan upon the point of consummation). If it were necessary thus to await developments in the state court proceedings, the loss of time incident to beginning over again under Chapter X and the accumulation of expense in the state court proceeding might, at the later stage, offset the superiority of the Chapter X procedure. In such a case we believe that the statute calls for a realistic appraisal of the potentialities of the two proceedings in the light of traditional inadequacies and abuses of the older procedures and of the safeguards of Chapter X.[7] This approach was rejected by the court below.

[7] Among these safeguards we advert particularly to the provision for an independent trustee, who is not a mere stakeholder but has definite reorganization responsibilities as a "focal point" for investor organization (Sec. 167, 11 U. S. C. sec. 567); the power to bind dissenters and to dispense with the cumbersome machinery of judicial sale and the necessity of paying dissenters in cash; and the affirmative responsibility of the Court to find the plan fair, equitable and feasible as distinguished from the tendency of receivership courts to concern themselves only with grossly inequitable results. As applied to the smaller proceedings, such as that involved in the instant case, we do not emphasize the advisory functions of the Commission. In the instant case the Commission was

Review by this Court is necessary to correct a substantial inroad upon the availability of Chapter X, contrary, we believe, to the proper interpretation of the statute and of this Court's decision in the *Marine Harbor* case.

II

The instant case involved a clash of interests between the majority and minority bondholders of the very type which should have compelled the court to weigh the relative advantages and particular benefits of Chapter X as against "the older procedures which Ch. X was designed to improve and supplant" (317 U. S. at 87). Seifried and Bishop were associates in other real estate ventures and their apparent purpose in precipitously instituting the local foreclosure was to obtain a bargain purchase of the debtor's apartment building. Their self-interest conflicted seriously with that of the other bondholders. The state court action afforded the minority bondholders very little protection against the danger of being squeezed out of the enterprise with inadequate compensation. The price obtainable at the foreclosure sale probably would have been inadequate, since it is apparent that a fair price for an apartment building ordinarily can be secured only after a search for a suitable purchaser and arm's length bargaining, and not on the auction block.

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not a party in the District Court and advised the court below that it would not seek to intervene if the jurisdiction of the bankruptcy court should be sustained.

The Circuit Court of Appeals referred, however, to the general equity power of the local court "to see to it that one creditor does not receive an undue advantage of another," and to its more specific power to refuse approval to a foreclosure sale in the event of unfairness (R. 118–119), citing *Levy* v. *Broadway-Carmen Building Corporation,* 366 Ill. 279, 8 N. E. 2d 671 (1937). In addition, the circuit court noted that the local court, in the exercise of its general equity powers, could "where the interests of a number of bondholders are involved, consider an intervening petition proposing a plan by and for the protection of the bondholder," citing *First National Bank* v. *Bryn Mawr Beach Building Corporation,* 365 Ill. 409, 6 N. E. 2d 654 (1937) (R. 119).

The circuit court's view of the Illinois law, however, is a very optimistic one and apparently much more advanced than that of the state court itself. In the *Bryn Mawr* case, a bid at a master's sale was made by a representative of a bondholders' committee pursuant to an existing plan of reorganization. The holding of the state supreme court is simply that the equity court could properly consider the existing plan of reorganization in deciding whether or not to approve the sale to the bondholders' committee. There was no holding that a minority bondholder may prevent a foreclosure sale by the alternative of an application to the court for a reorganization of the

debtor in the foreclosure proceedings. In the *Levy* case the Illinois court took cognizance of the discretionary power of the foreclosure court to fix an "upset price," but recognized that this price may merely be one which is not so grossly inadequate as to shock the conscience of the court (366 Ill. 288).

In addition, the Circuit Court of Appeals ignored the nature of foreclosure practice in situations such as that in the instant case, where the foreclosure was instituted by an indenture trustee wholly subject to the control of a majority bondholder and where opposition by the debtor and other bondholders was effectively stifled. Minority bondholders received no notice of the filing of the bill and none apparently was required under state law since, under the indenture, the exclusive right of action vested in the indenture trustee. The bondholders, not being necessary parties, had no absolute right of intervention. See *Firebaugh* v. *Traff*, 353 Ill. 82, 186 N. E. 526 (1933); *American Trust & Safe Co.* v. *180 East Delaware Building Corp.*, 262 Ill. App. 67 (1931). The majority bondholder not only directed the action of the indenture trustee but also represented the latter as its attorney in the foreclosure proceeding. Moreover, since this majority bondholder held also a controlling interest in the capital stock of the debtor, no opposition was forthcoming from the latter. Had the local proceeding

been uninterrupted, it is improbable that there would have been any other result than a sale to the highest bidder. The property probably would have been bid in by the respondent who, under the indenture, was in a position to apply his bonds toward the purchase price and secure title free from any possibility of redemption by the debtor. In the event of a denial of the instant petition for certiorari, this will be the probable result.

Under these circumstances, resort to the Chapter X machinery was necessary for the protection of the other bondholders. A Chapter X court would provide an independent and disinterested trustee (Section 156, 11 U. S. C. 556) whose duties would include the formulation of a fair, equitable, and feasible plan (Section 169, 11 U. S. C. 569). The attorney for the reorganization trustee would also be disinterested (Section 157, 11 U. S. C. 557). All bondholders would be notified of the ocurrence of such steps as hearings on the qualifications of the trustee (Section 161, 162, 11 U. S. C. 561, 562), the filing of a plan of reorganization (Section 169, 171, 11 U. S. C. 569, 571), and the like. Under Chapter X, the majority bondholder cannot use the indenture trustee to control the conduct of the proceedings. Votes not cast in "good faith" would be eliminated (Section 203, 11 U. S. C. 603). Upon court confirmation, the plan would be binding upon dissenters (Section 224, 11 U. S. C. 624).

Among other alternatives, a Chapter X reorganization could take the form of an extension of the debt or a reduction of the interest rate or of the principal of the mortgage indebtedness to the point where no undue burden would be placed upon the earning capacity of the debtor. Through its disinterested trustee, the Chapter X court could obtain informed and independent advice as to the type of plan best adapted to serve the interests of all the creditors, including the possibility of sale to a satisfactory purchaser dependent upon an arm's length bid of an adequate price.

We submit that a proper application of the statute and the rationale of this Court in the *Marine Harbor* case required an affirmance by the court below of the District Judge's approval of the Chapter X petition as having been filed in "good faith."[8]

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[8] In reversing the District Judge's order of approval, the Circuit Court of Appeals also noted that the petition "did not allege the specific facts showing the need for relief and that it was reasonable to suppose that a plan of reorganization could be effected, nor was there any proof tending to establish such facts" (R. 119). As to the lack of proof, the circuit court complained of the absence of "any evidence of the debtor's financial history, [and] its earning capacity, past, present, or prospective" (*ibid*). The Commission was not a party in the District Court proceedings and did not participate in the development of the record. However, where the proof is sufficient to satisfy the District Judge as to the "good faith" of the petition (see Section 144, 11 U. S. C. 544), the circuit court is not justified in requiring dismissal of the peti-

CONCLUSION

By virtue of the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be granted.

HAROLD JUDSON,
Acting Solicitor General.

ROGER S. FOSTER,
Solicitor,
Securities and Exchange Commission.

AUGUST 1945.

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tion, as the opinion and order of reversal here appear to do. Rather, if the court below deemed insufficient the evidence which satisfied the reorganization judge, it should have remanded the case to the lower court for the taking of further proof and for further consideration of the whole record. However, as the matter stood, since the Circuit Court had already assumed the adequacy of the prior state foreclosure proceeding under its own construction of the *Marine Harbor* case, further inquiry upon remand with regard to a reorganization was apparently useless.

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